IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. T.L. DIAMOND & CO., INC. and THEODORE L. DIAMOND Defendants.	Civil Action No. 3:08-cv-03079-JES-BGC

PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO ENTER CONSENT DECREE

Plaintiff, the United States of America ("United States" or "Plaintiff"), moves the Court to sign and enter as a final judgment the proposed consent decree lodged on March 31, 2008 ("Consent Decree" or "Decree").

The Consent Decree resolves the Complaint filed against T.L. Diamond & Co., Inc. ("TLD") and its President, Mr. Theodore L. Diamond ("Mr. Diamond"). Pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a), the Complaint, filed on behalf of the United States Environmental Protection Agency ("EPA"), alleges claims against TLD and Mr. Diamond. Specifically, the Complaint seeks the recovery of response costs incurred or to be incurred by the

United States in responding to the release and threatened release of hazardous substances from the Eagle Zinc Superfund Site (the "Site") in Hillsboro, Illinois.

As discussed further below, the Consent Decree should be entered. It is fair, reasonable and consistent with the purposes of CERCLA. The Decree resulted from an extensive, arm's length negotiation process. It obtains $750,000 from TLD and Mr. Diamond, parties who have previously spent $850,000 in investigating contamination at the Site. The Consent Decree secures environmentally restrictive covenants at the Site to assist EPA in protecting human health and the environment at the Site.

BACKGROUND

I. CERCLA

"In the 1970s and 80s, a number of high-profile environmental disasters, including the 'Love Canal' dumping at Niagara Falls, New York drew the public's attention to the environmental risks and health hazards posed by improper hazardous waste disposal." Metropolitan Water Reclamation Dist of Greater Chicago v. North American Galvanizing Coatings, Inc., 473 F.3d 824, 827 (7th Cir. 2007). "In response to rising public concern and the view that existing law was clearly inadequate . . . Congress enacted CERCLA." Id. (internal citations and brackets omitted). In enacting CERCLA, "Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal." Sydney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994). Congress further intended that "those responsible for problems caused the disposal of chemical poisons bear the costs and responsibilities for remedying the harmful conditions they created . . . ." Id.

"Enforcement of CERCLA rests primarily with the EPA, and the statute gives the agency a broad range of enforcement options." Metropolitan Water Reclamation, 473 F.3d at 827. Section 107 of CERCLA, 42 U.S.C. § 9607, authorizes the United States and private parties "to recover the costs incurred in responding to and cleaning up hazardous substances at contaminated sites." Illinois v. Grigoleit Co., 104 F. Supp. 967, 975 (C.D. Ill. 2000). Under Section 107, EPA may recover costs from certain categories of "potentially responsible parties" ("PRPs"), which includes current and former owners or operators of the facility in question. 42 U.S.C. § 9607(a)(1) - (2); PMC, Inc. v. Sherwin Williams Co., 151 F.3d 610, 613 (7th Cir. 1998). "For these statutorily defined parties, or PRPs, liability under § 107(a) is strict, joint and several." Metropolitan Water Reclamation, 473 F.3d at 827. Thus, "by invoking § 107(a), the EPA may recover its costs in full from any responsible party, regardless of that party's relative fault." Id.[1]

II. The Site

The Site is an abandoned industrial property situated on approximately 132 acres of land in Hillsboro, Illinois. Complaint ¶ 6; Consent Decree, App. B (Site map). From as early as 1913 until 2003, the Site was used for zinc smelting to produce zinc oxide. This process created residues that contain zinc, cadmium, arsenic, and other compounds that are "hazardous substances" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14). These residues were disposed of at the Site. See Complaint ¶¶ 7, 10, 13. Because of the potential threats that such hazardous substances may pose to public health and the environment, EPA recently listed the Site on the National Priorities List ("NPL"), a list of the nation's most contaminated sites. Id. ¶ 8 (citing 72 Fed. Reg. 56,463 (Sept. 19, 2007)).

[1]"The only exception to joint liability is where the harm is divisible . . . ." Id.

EPA continues to investigate the Site, but it has identified four companies that manufactured zinc oxide there for approximately 90 years: Lanyon Brothers Zinc Company ("Lanyon Brothers")[2]; EaglePicher Industries, Inc. ("EaglePicher"), the Sherwin Williams Company ("Sherwin Williams"), and T.L. Diamond & Co., Inc. ("TLD"). Lanyon owned and operated the Site from 1913 until 1919; EaglePicher owned and operated the Site from 1919 until 1980; Sherwin Williams then owned it from 1980 to 1984, operating until at least 1983; and T.L. Diamond has owned the Site from 1984 to the present, although it ceased operations in 2003. See, e.g., Deposition of Morris Dodd ("Dodd Depo") (Ex. 1), at 5-7, 16-27, 32-33 39-40, 49-53, and 64-65 (describing the operation of the Site); Deposition of Luther Moler ("Moler Depo") (Ex. 2), at 6-7, 18-26, 30-32, 45-62 (same).[3]

On December 31, 2001, EPA entered into an Administrative Order by Consent ("Administrative Order") with three of these PRPs: EaglePicher,[4] Sherwin Williams, and TLD. See Administrative Order (Ex. 3). Pursuant to the Administrative Order, the PRPs performed a Remedial Investigation/Feasibility Study ("RI/FS") that evaluated the nature and extent of contamination at the Site, assessed health and ecological risks, and identified potential cleanup options. See generally 40 C.F.R. § 300.430(d)(1) (discussing the purpose of an RI); id. § 300.430(e)(1) (discussing the purpose of an FS).

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[2]Lanyon Brothers appears, based on present information, to be a long defunct company.

[3]The depositions of Mr. Dodd and Mr. Moler were taken pursuant to a Petition to Perpetuate Testimony. Fed. R. Civ. P. 27. See also discussion below, at p.7.

[4]In 2005, EaglePicher filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code. In re EaglePicher Holdings, Inc., Nos. 1-05-bk-12601 & 1-05-bk-12604 (Bankr. S.D. Ohio). In that bankruptcy proceeding, the United States has filed a general unsecured claim against EaglePicher for response costs at the Site pursuant to Section 107(a) of CERCLA.

In consultation with the State of Illinois, EPA is evaluating the draft RI/FS report prepared by the PRPs and gathering supplemental information necessary to make a decision on recommended cleanup measures for the Site. The next steps for EPA will include: (1) proposing for public comment cleanup measures for the Site, (2) soliciting and considering public comment on the proposal, and (3) selecting a final remedy for the Site based on the administrative record. See generally 42 U.S.C. § 9604 (response authorities); id. § 9621 (cleanup standards). EPA currently estimates that its total costs will be in the range of $5.4 million,[5] although EPA's ultimate costs could be higher or lower because the clean up process is in the early stages.

III. The Settlement and Investigative Process

In 2005, the Settling Defendants, represented by experienced counsel, stepped forward and began a settlement dialogue with the United States on how to contribute toward the costs of cleaning up the Site. Counsel for the Settling Defendants informed the United States that TLD was interested an "ability to pay" settlement based on the company's financial condition. The United States carefully investigated TLD's financial circumstances. It obtained verified financial statements, tax returns, and other financial information. See Consent Decree, App. A (listing fifty-seven financial documents).

The United States conducted a financial analysis of TLD's ability to pay for a settlement at the Site. That analysis was performed by Mr. Jeffrey Friedman, a career analyst in the Corporate Finance Unit of the Department of Justice's Antitrust Division. See Declaration of Jeffrey Friedman ("Friedman Decl."), ¶ 1 (Ex. 4). Mr. Friedman regularly assists the

[5]See Proof of Claim of the United States on Behalf of Certain Agencies of the United States of America, ¶ 5, filed in, In re EaglePicher Holdings, Inc., Nos. 1-05-bk-12601 & 1-05-bk-12604 (Bankr. S.D. Ohio Oct. 7, 2005).

Environmental Enforcement Section of the Department of Justice by analyzing parties' ability to pay. Id. ¶ 2. He has assisted the Environmental Enforcement Section in this capacity for more than twenty years, and has conducted approximately fifty ability to pay analyses in the past five years alone. Id. ¶3.

After reviewing extensive financial information summarized in Appendix A to the Consent Decree, Mr. Friedman concluded that an ability to pay settlement was proper considering TLD's financial circumstances. Id. ¶ 9. TLD stopped doing business in 2003. Id. ¶ 7. It no longer operates the Site or another zinc smelting facility in West Virginia. Id. Mr. Friedman concluded that TLD had minimal remaining assets. Based on TLD's overall financial circumstances, Mr. Friedman concluded that TLD's ability to pay was $500,000. Id. ¶¶ 7-9.

While investigating and analyzing TLD's financial circumstances, the United States continued its investigation of the Site. That investigation included determining what role, if any, Mr. Theodore Diamond, President and the sole shareholder of TLD, played in the operation and contamination of the Site. To that end, EPA issued requests for information to TLD and Mr. Diamond pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 104(e). See EPA's Request for Information to TLD (May 24, 2006) (Ex. 5). In responses to these information requests, Mr. Diamond denied being an "operator" of the Site under Section 107(a)(2) of CERCLA.[6]

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[6]See Letter from John Ix, Counsel for Settling Defendants, to Thomas Krueger, EPA (July 5, 2006), Enclosing T.L. & Diamond & Company, Inc's Initial Response to EPA's Request for Information Pursuant to 42 U.S.C. § 9604, Dated May 24, 2006, at 2-3, Response to Question #14 ("Initial Section 104(e) Response") (Ex. 6); Letter from John Ix, Counsel for Settling Defendants, to Thomas Krueger, EPA (July 12, 2006), Enclosing T.L. Diamond & Company, Inc's Supplemental Response to EPA's Request for Information Pursuant to 42 U.S.C. § 9604 Dated May 24, 2006, at 1-2, & 5 (response to Question #9 and Mr. Diamond's signature) ("Supplemental Section 104(e) Response") (Ex. 7).

Finally, the United States' investigation included taking two pre-filing depositions of two long-time, former employees at the Site. See Dodd Depo. at 5-7 (Ex. 2)(worked 31 years at the Site); Moler Depo (Ex.1) at 6-7 (worked 46 years at the Site). To take these depositions, the United States filed a petition to perpetuate testimony in August 2007. See In re Unopposed Verified Petition of the United States of America to Perpetuate Testimony, No. 1:07 MC (N.D. Ohio filed Aug. 17, 2007) [hereinafter "In re Petition"] (Ex. 8). The Petition was served on Sherwin Williams. See id. ¶ 15. In the brief accompanying the August 2007 Petition, the United States informed Sherwin Williams that it was engaged in settlement discussions with TLD and was open to beginning separate settlement discussions with Sherwin Williams. In re Petition, Memorandum in Support of United States' Unopposed Verified Petition to Perpetuate Testimony ("Petition Memo."), at 4 (filed Aug. 17, 2007) (Ex. 9). On October 30, 2007, counsel for Sherwin Williams attended and took part of the depositions. See Morris Depo (Ex. 1); Moler Depo. (Ex. 2). Until March 2008, however, Sherwin Williams expressed no interest in having settlement discussions with the United States, when it was informed that a proposed Consent Decree with the Settling Defendants was about to be lodged with the Court.

IV. The Complaint and the Proposed Consent Decree

In late March 2008, the United States filed a Complaint against the Settling Defendants and lodged a proposed Consent Decree. The Complaint alleges that TLD and Mr. Diamond ("Settling Defendants") are former owners or operators of the Site under CERCLA Section 107(a), 42 U.S.C. § 9607(a). See Complaint ¶ 13.

To settle these allegations, TLD agreed to pay $500,000 based on the United States' analysis of its ability to pay. Mr. Diamond agreed to pay an additional $250,000, id. ¶ 7, which the United States determined was appropriate based on its litigation risk in pursuing Mr. Diamond as an operator under CERCLA, as discussed further below. This $750,000 payment will be deposited into a special account to fund response actions at the Site. See Consent Decree, ¶10.[7] Moreover, the Consent Decree secured "Environmental Restrictive Covenants" on the Site. TLD has agreed to record covenants that will prohibit residential homes on the Site, forbid physical interference with any remedy for the contamination that EPA ultimately selects, and impose other restrictions intended to protect human health and the environment. See Consent Decree, § XIII (Access and Institutional Controls), pp.17-21; id. App. D, ¶ 5.

In exchange for this relief, the United States granted the Settling Defendants covenants not to sue for certain claims under CERCLA and Section 7003 of the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6973. See Consent Decree, ¶¶ 16 - 17.[8] These covenants not to sue are subject to certain conditions and reservations of rights. See ¶¶ 16-23. For example, the United States "covenant not to sue" to TLD "is conditioned upon the veracity and completeness of the Financial Information provided to EPA by TLD." Id. ¶ 16. The United States' reservation of rights against Mr. Diamond includes the ability to pursue him if "unknown conditions or information" arise at the Site, as specified in the Consent Decree. Id. ¶¶ 21-22; id. App. C. The Consent Decree also grants the Settling Defendants protection from contribution actions or claims by third-parties for "matters addressed" in the Decree. Id. ¶ 30.

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[7]In addition to the $750,000 payment under the Decree, the Settling Defendants previously expended $850,000 toward the RI/FS pursuant to the Administrative Order. See Consent Decree, ¶ I.B-C, at pp.1-2.

[8]Although the United States alleged only a CERCLA claim, the related covenant not to sue under RCRA Section 7003 was proper, and Sherwin Williams did not object to it. See United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1090 (1st Cir. 1994) (approving United States' settlement of claim not alleged in complaint).

The Consent Decree was expressly conditioned on the United States seeking public comment on whether the decree was appropriate. Consent Decree, ¶ 46. To the extent that the public comments indicated that the Consent Decree was improper or inadequate, the United States reserved the right to withdraw from the settlement. Id. On April 11, 2008, the United States Department of Justice published a Notice in the Federal Register of the lodging of the Consent Decree. 73 Fed. Reg. 19,893 (2008). The notice sought written public comments for a period of thirty days.

On May 16, 2008, Sherwin Williams Company ("Sherwin Williams"), a former operator of zinc smelters at the Site, filed comments with the Department of Justice objecting to the settlement. See Comments (Ex. 10).[9] No other comments were received on the Decree. Although Sherwin Williams' comments will be discussed in detail below, its principal objections are that: (1) Sherwin Williams was not given an opportunity to settle with the United States before the Consent Decree was lodged; (2) the Decree is substantively unfair because the settlement payments allegedly do not reflect how long the Settling Defendants operated the Site; (3) the United States' ability to pay analysis was flawed; and (4) the settlement leaves Sherwin Williams at risk of disproportionate liability at the Site.

Having carefully reviewed and considered Sherwin Williams' comments, the United States has determined that the proposed Consent Decree is fair, reasonable, and consistent with CERCLA's purposes, for the reasons explained below. The United States therefore respectfully moves this Cour to enter and approve the settlement as a final judgment.

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[9]Sherwin Williams' May 16 comments were timely filed because the United States granted the company a one week extension of the comment period.

ARGUMENT

V. Standard of Review

Approval of a consent decree lies within the informed discretion of the Court. See United States v. Akzo Coatings of America, Inc., 949 F. 2d 1409, 1435 (6th Cir. 1991). That discretion generally should be exercised in favor of the settlement of litigation. See Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1984). The "presumption in favor of voluntary settlement . . . is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field." Akzo Coatings, 949 F.2d at 1436.

"When reviewing a consent decree, a court need only satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." Akzo Coatings, 949 F.2d 1409, 1424 (6th Cir. 1991) (internal quotation marks and citation omitted); accord United States v. Fort James Operating Co., 313 F. Supp. 2d 902, 906 (E.D. Wis. 2004). While courts independently evaluate these factors, judges "may not substitute . . . [their] own judgment for that of the parties to the decree." Akzo Coatings, 949 F.2d at 1435.

VI. The Consent Decree Should Be Entered.

The Consent Decree with the Settling Defendants should be entered and approved because it is fair, reasonable, and consistent with CERCLA's purposes. Nothing in Sherwin William's comments, which the United States responds to below, demonstrates otherwise.[10]

[10]In its comments, Sherwin Williams appears to minimize its role at the Site. Compare, e.g., Comments, at 2 (Sherwin Williams operated Site one year), with Moler Depo. at 45-26, 56-57 (Sherwin Williams kept Site open from 1980 to 1983). To decide this motion, the Court need not resolve factual issues regarding Sherwin Williams' operation of the Site, which are irrelevant to whether the Consent Decree with the Settling Defendants should be entered.

A. The Consent Decree is Fair.

"Assessing fairness in the CERCLA settlement context has both procedural and substantive dimensions." United States v. Davis, 261 F.3d 1, 23 (1st Cir. 2001); see also Fort James, 313 F. Supp. 2d at 907. Here, the Consent Decree was the product of an arm's length negotiation process that led to a fair result.

1. The Consent Decree is Procedurally Fair.

"Generally, the requirement of procedural fairness is satisfied if the proposed settlement is negotiated at arm's length and is conducted forthrightly and in good faith." United States v. Brook Village Assoc., No. Civ. A. 05-195, 2006 WL 3227769, at *4 (D.R.I. Nov. 6, 2006). The United States and the Settling Defendants negotiated at arm's length and in good faith. Settlement negotiations began in 2005. Both sides were represented by experienced counsel. At the same time, EPA and the Department of Justice continued their overall investigation of the Site, including the Settling Defendants' role there. That investigation including issuing formal information requests and taking pre-filing depositions. See pages p. 5-7 above. This careful process resulted in a fair decree. See, e.g., United States v. Oregon, 913 F.2d 576, 581 (9th Cir. 1990) (holding that consent decree is "presumptively valid" where it is the product of "good faith, arms-length negotiations.").

In its comments, Sherwin Williams argues that the settlement was procedurally unfair because "Sherwin Williams did not have the same opportunity to engage in settlement negotiations concerning its ultimate liability at the Site." Comments, at 4 (Ex. 10). However, "[t]he CERCLA statutes do not require the agency to open all settlement offers to all PRPs . . . ." Cannons Engineering, 899 F.2d at 93. "After all, 'divide and conquer,' has been a recognized negotiating tactic since the days of the Roman Empire . . . ." Id.

Nonetheless, the United States provided an opportunity to Sherwin Williams to engage in separate settlement discussions before the lodging of the proposed Consent Decree. In an August 2007 brief served on Sherwin Williams in the deposition petition case, the United States wrote:

> [T]he United states is negotiating a consent decree with T.L. Diamond, which approached the United States about settlement. The United States is also willing to discuss settlement with Sherwin Williams, although discussions have not begun.

In re Petition, Petition Memo., at 4 (Ex. 9).[11] For nearly eight months, Sherwin Williams ignored this invitation, responding only belatedly, on the eve of the United States lodging the Proposed Consent Decree on March 31, 2008.

2. The Consent Decree is Substantively Fair.

The starting point for the substantive fairness inquiry is usually the comparative fault of the entities involved in the contamination. See, e.g., United States v. Cannons Eng'r Corp., 899 F.2d 79, 87-88 (1st Cir. 1990). However, "EPA . . . must also be accorded flexibility to diverge from an apportionment formula in order to address special factors not conducive to regimented treatment." Id. "Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it . . . ." Id. at 87.

The proposed settlement with TLD is substantively fair. As an initial matter, TLD previously paid $600,000 toward the RI/FS pursuant to the Administrative Order. See Consent

[11]Unlike Sherwin Williams, the Settling Defendants stepped forward in 2005 and initiated a settlement dialogue with the United States on how to contribute toward the costs of cleaning up the Site.

Decree, § I.B.-C, at 1-2. As to additional payment under the Consent Decree, the United States conducted a thorough financial analysis and concluded that TLD could pay $500,000. Friedman Decl. ¶¶ 7-9 (Ex. 4); Consent Decree, App. A (listing fifty-seven financial documents that the United States considered in its ability to pay analysis). See also Brooks Village Assoc., 2006 WL 32277, at *6 ("'While certain PRPs have deep pockets and can afford to shoulder their full share of liability for a site's cleanup, other PRPs simply do not have the resources to pay their share.'") (quoting United States v. Bay Area Battery, 895 F. Supp 1524, 1529 (N.D. Fla. 1995)). TLD no longer operates any facilities, and it has minimal remaining assets. Friedman Decl. ¶¶ 7-9 (Ex. 4). The settlement with TLD is substantively fair because it reflects what the company can pay. See, e.g., United States v. Capital Tax Corp., No. 04 C 4138, 2007 WL 27729436, at *2-*3 (N.D. Ill. Sept. 18, 2007) (approving CERCLA consent decree based on ability to pay); Bay Area Battery, 895 F. Supp. at 1527-1536 (same); United States v. Vertac Chem. Corp., 756 F. Supp. 1215, 1219 (E.D. Ark. 1992) (same), aff'd sub nom, United States v. Hercules, Inc., 961 F.2d 796, 800 (8th Cir. 1992).

The $250,000 settlement with Mr. Diamond is also substantively fair based on litigation risk. See, e.g., Fort James Operating Co., 313 F. Supp.2d at 908 (finding that CERCLA decree was substantively fair based on "the risks of litigating the claim"). There is litigation risk in pursuing Mr. Diamond on a veil piercing theory and as a direct "operator" of the Site under CERCLA Section 107(a)(2), 42 U.S.C. § 9607(a)(2). First, there are litigation risks with attempting to pierce the corporate veil of TLD to hold Mr. Diamond, as corporate president, derivatively liable for TLD's contamination of the Site. See generally United States v. Bestfoods, 524 U.S. 51 (1998) (veil piercing applies to CERCLA claims). To illustrate, one of the key veil piercing factors is a failure "to comply with the legal requirements for operating in the corporate form." Browning-Ferris Indus. v. Ter Maat, 195 F.3d 953, 960 (7th Cir. 1999). Mr. Diamond contends that he carefully maintained the separate corporate form of TLD. See, e.g., Consent Decree, App. A (listing many years of separate accounting financial statements and tax returns for TLD).

Similarly, there are litigation risks associated with bringing a direct claim against Mr. Diamond as a former "operator" of the Site under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2). See, e.g., Ter Maat, 195 F.3d 953, at 954-56 (discussing CERCLA liability of corporate officers). CERCLA "operator[s] must manage, direct, or conduct operations specifically related to pollution, that is operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." Bestfoods, 54 U.S. at 66-67. While the United States' investigation revealed sufficient information to allege a claim against Mr. Diamond as an operator, see Compl. ¶¶ 1, 13, there are litigation risks in pursuing that claim. In his responses to EPA's Section 104(e) information requests, Mr. Diamond contends that he did not operate the Site. See Initial Section 104(e) Response (Ex. 6); Supplemental Section 104(e) Response (Ex. 7).[12]

Further, Sherwin Williams argues the Consent Decree is substantively unfair because it does not reflect the Settling Defendants' "comparative fault" at the Site. Specifically, Sherwin

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[12]Information requests issued under Section 104(e) of CERCLA are not to be taken lightly by the responding party: substantial civil penalties may be imposed for insufficient responses. See, e.g., 42 U.S.C. § 9604(e)(5) (authorizing civil penalties for failing to comply with Section 104(e)); United States v. Gurley, 235 F. Supp.2d 797, 802-09 (W.D. Tenn. 2002) (awarding $1,908,000 civil penalty for insufficient and late responses to Section 104(e) information requests), aff'd, 384 F.3d 316 (6th Cir. 2004).

Williams asserts that the years that the Settling Defendants operated the Site should be the sole criterion for determining comparative fault. Comments, at 4-6 (Ex. 10).

However, the principal authority that Sherwin Williams relies upon - Cannons Engineering - makes clear that "[t]here is no universally correct approach" for comparative fault. 899 F.2d at 87; see also Comments, at 4-5 (Ex. 10) (citing Cannons). Rather, "what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances should be left largely to EPA's expertise." Cannons Engineering, 899 F.2d at 87. Here, EPA properly determined comparative fault and substantive fairness based on ability to pay for TLD and litigation risk for Mr. Diamond. See Brooks Village Assoc, 2006 WL 3227769, at *6 ("financial health" of settling defendant properly considered in determining comparative fault of settling parties); id. at *11 (considering litigation risks in determining reasonableness of settlement with other settling defendant).

Even if years of operation at the Site were the only yardstick for measuring comparative fault in settlement, the Decree would be substantively fair based on the total costs spent by the Settling Defendants at the Site. The Site was operated for ninety years, from 1913 to 2003. See Compl. ¶ 7. The United States contends that the Settling Defendants operated the Site for nineteen of those ninety years, from 1984 to 2003. See also Comments, at 2 (agreeing that TLD operated the Site for nineteen years). Thus, the Settling Defendants allegedly operated the Site for 21% of the ninety years of active operation (19/90 = .21). Using Sherwin Williams years of operation criterion, the Settling Defendants should pay $1, 134,000 toward the estimated $5.4 million in Site costs (.21 x 5,400,000 = 1,134,000). The Settling Defendants will have paid more than this "fair" amount – $1.6 million – upon the entry of the Consent Decree. The Settling

Defendants previously paid $850,000 toward the RI/FS pursuant to the Administrative Order, see Consent Decree, ¶ I.B-C., at pp.1-2; Administrative Order (Ex. 3), and the Consent Decree requires the Settling Defendants to pay an additional $750,000. Id. ¶¶ 6-7. The settlement meets even the fairness standards proposed by Sherwin Williams.[13]

B. The Consent Decree is Reasonable.

In evaluating reasonableness, courts consider the agreement's expected effectiveness in cleaning up the environment, whether it appropriately compensates the public, and litigation risks. See, e.g., Fort James, 313 F. Supp. 2d at 910. As discussed above, there are litigation risks in attempting to pursue Mr. Diamond as an operator of the Site under CERCLA. Despite such risks, the Consent Decree recovers a total of $750,000 toward the costs the currently estimated $5 million cost of cleaning up the Site. Consent Decree, ¶¶ 6-7, 10. In addition, the Settling Defendants previously paid $850,000 toward the Remedial Investigation and Feasibility Study pursuant to an administrative order with EPA, see Consent Decree, ¶¶ I.B-C., at pp.1-2, which allowed EPA to avoid incurring costs. Settlement avoids litigation and delay. It is particularly reasonable where, as here, continued litigation would drain the defendant's funds, ensuring a Pyrrhic victory. See, e.g., Bay Area Battery, 895 F. Supp. at 1534 ("Though the Government could likely obtain a judgment against these parties, the costs of litigating and levying against the parties would likely outstrip the ultimate recovery. By settling with these PRPs now, the Government insures what little money the settlors have to contribute will be used

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[13]The $1.6 million paid by the Settling Defendants is even fair using Sherwin William's asserted $7 million in Site costs. See Comments, at 3, 5 (Ex. 10). Using $7 million in total costs, TLD's share of liability would be $1.47 million (TLD's 21% of Site years of operation x $7 million in estimated site costs = $1,470,000).

to clean up the environment rather than pay attorneys.").

In its comments, Sherwin Williams faults the United States for not conducting an ability to pay analysis for Mr. Diamond. See Comments at 4, 7 (Ex. 10). But Mr. Diamond's settlement was based on the United States' assessment of litigation risk, not his financial health. Therefore, an ability to pay analysis would have been irrelevant.

Sherwin Williams further asserts that the ability to pay information regarding TLD was outdated because the United States only reviewed information through 2005. Comments at 4, 7 (Ex. 10). However, the United States continued to receive updated financial information from TLD through December 2007. See Consent Decree, App. A; Friedman Decl. ¶ 9 (Ex. 4). This review was reasonable: TLD stopped doing business in 2003, and it has minimal remaining assets. Friedman Decl. ¶¶ 7, 9 (Ex. 4). Moreover, the Consent Decree required TLD by signing the Decree to certify that its financial circumstances have not "materially changed" since submitting the financial information. Consent Decree, ¶ 42(b). The United States' "covenant not to sue" to TLD "is conditioned upon the veracity and completeness of the Financial Information provided to EPA by TLD." Id. ¶ 16.[14]

C. The Consent Decree Serves the Purposes of CERCLA.

The Consent Decree furthers CERCLA's purposes. CERCLA aims to ensure that responsible parties pay for the cleanups necessitated by their activities, while also favoring settlements where possible. E.g., Fort James, 313 F. Supp. 2d at 911. The statute explicitly

[14]In any case, the United States' determination of a particular defendant's ability to pay is not subject to judicial review. See 42 U.S.C. § 9622(g)(7), (g)(11); United States v. Atlas Lederer Co., 494 F. Supp.2d 629, 637-38 (S.D. Ohio 2005).

includes a party's ability to pay as a factor to be considered in several provisions related to allocating costs and crafting covenants not to sue. 42 U.S.C. § 9622(e)(3)(A), (f)(6)(B), and (g)(7). Indeed, "[t]here is no question" that CERCLA authorizes settlement based on the party's financial condition. Bay Area Battery, 895 F. Supp. at 1535.

These statutory purposes are met here. The United States has carefully considered TLD's financial condition and reached an agreement representing its ability to pay. The settlement with Mr. Diamond, which was based on litigation risk, ensures that additional money goes toward cleaning up the Site, rather than to finance litigation. See Hercules, 961 F.2d at 800; 42 U.S.C. § 9622(a) (directing government to, whenever possible, "facilitate agreements . . . in order to expedite effective remedial actions and minimize litigation.").

Despite these factors, Sherwin Williams argues in its comments that the Consent Decree conflicts with CERCLA's purposes because the settlement purportedly "does nothing" toward clean up the Site. See Comments, at 8 (Ex. 10). But Sherwin Williams ignores the fact that the $750,000 will be deposited into a special account to fund response actions at the Site. See Consent Decree, ¶10. Sherwin Williams also fails to acknowledge that the Consent Decree secures Environmental Restrictive Covenants on the Site. Those Covenants will prohibit residential homes on the Site, forbid physical interference with any remedy for the contamination that EPA ultimately selects, and impose other restrictions intended to protect human health and the environment. See Consent Decree, § XIII (Access and Institutional Controls), pp.17-21; id. App. D, ¶5.

Sherwin Williams suggests that the Decree does not serve CERCLA's policy goals because the settlement will leave it at risk of disproportionate share of liability the costs of cleaning up the Site. Comments, at 6, 8 (Ex. 10). However, "Congress explicitly created a statutory framework that left nonsettlors at risk of bearing a disproportionate amount of liability." Cannons Engineering, 899 F.2d at 91. Specifically, Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), bars Sherwin Williams' contribution claims for matters addressed in the Consent Decree. See Consent Decree, ¶ 30. Contribution protection "encourage[s] parties to settle early with the United States and discourage[s] dilatory and strategic behavior." United States v. BASF Corp., 990 F. Supp. 907, 912 (E.D. Mich. 1998).

CONCLUSION

The proposed Consent Decree is fair, reasonable, and furthers CERCLA's goals. The United States respectfully requests that the Court forthwith sign and enter the proposed Consent Decree as a final judgment.

Dated: July **[DATE]**, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the Plaintiff United States' Motion to Enter Consent Decree and Memorandum in Support of Motion to Enter Consent Decree were served upon the following persons on this date by electronic mail and first-class mail, postage prepaid:

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